RECORD
AND
BRIEFS

No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS'S COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
SAM HIRSCH
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
KEITH E. SAXE
R. LEE LEININGER
JAMES J. DUBOIS
STEPHEN M. MACFARLANE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

TABLE OF CONTENTS

Page

Jurisdiction 1
Statement 1
A. Introduction 1
B. The Rio Grande Basin 3
C. The Rio Grande Project 4
D. The Rio Grande Compact 8
E. The state water adjudication 13
F. The current controversy 16
Summary of argument 22
Argument 25
I. Texas and the United States have stated a claim under the Compact upon which relief can be granted 26
A. Texas receives its equitable apportionment under the Compact through Project deliveries 26
B. New Mexico's interference with Project deliveries to Texas, as alleged in the complaints, is a violation of the Compact 33
C. Texas can enforce its rights under the Compact through an original action in this Court 41
II. Even if the Court concludes that Texas has not stated a claim under the Compact, the Court should not dismiss the United States' complaint 51
Conclusion 53
Appendix — Contract 1a

TABLE OF AUTHORITIES

Cases: Page

Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin, In re, No. 2006-3291 (327th Jud. Dist. Tex. Oct. 30, 2006).....16
Alabama v. *North Carolina*, 560 U.S. 330 (2010).....36, 37
Ashcroft v. *Iqbal*, 556 U.S. 662 (2009).....26
Bean v. *United States*, 163 F. Supp. 838 (Ct. Cl.), cert. denied, 358 U.S. 906 (1958).....43
Bell Atl. Corp. v. *Twombly*, 550 U.S. 544 (2007).....25, 26
California v. *United States*, 438 U.S. 645 (1978).....42
City of El Paso v. *Reynolds*, 563 F. Supp. 379 (D.N.M. 1983).....31
Cuyler v. *Adams*, 449 U.S. 433 (1981).....42
Elephant Butte Irrigation Dist. v. *Regents of N.M. State Univ.*, 849 P.2d 372 (N.M. App.), cert. denied, 851 P.2d 481 (N.M. 1993).....13
Fox v. *Young*, 91 S.W.2d 857 (Tex. Civ. App. 1936).....38
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).....42
Ide v. *United States*, 263 U.S. 497 (1924).....43
Israel v. *Morton*, 549 F.2d 128 (9th Cir. 1977).....44
Kansas v. *Colorado*, 514 U.S. 673 (1995).....32, 36
Kansas v. *Nebraska*:
525 U.S. 1101 (1999).....31
527 U.S. 1020 (1999).....32
528 U.S. 1001 (1999).....32
530 U.S. 1272 (2000).....32
Kelley v. *Carlsbad Irrigation Dist.*, 415 P.2d 849 (N.M. 1966).....15, 48, 49
Kolovrat v. *Oregon*, 366 U.S. 187 (1961).....46

Cases—Continued: Page

Missouri v. *Holland*, 252 U.S. 416 (1920) 46
Montana v. *Wyoming*, 131 S. Ct. 1765 (2011) 43
Northwest, Inc. v. *Ginsberg*, 134 S. Ct. 1422 (2014) 37
Strawberry Water Users Ass'n v. *United States*, 576 F.3d 1133 (10th Cir. 2009) 44
Tarrant Reg'l Water Dist. v. *Herrmann*, 133 S. Ct. 2120 (2013) 42
Texas v. *New Mexico*, 462 U.S. 554 (1983) 36
United States v. *City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002) 13, 14
United States v. *Nevada & California*, 412 U.S. 534 (1973) 52
West Virginia v. *Sims*, 341 U.S. 22 (1951) 47

Constitution, treaty, statutes and rule:

U.S. Const. Art. III, § 2, Cl. 2 51
Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex. 20, 27, 45, 52
art. I, 34 Stat. 2953-2954 ..... 8, 52
art. II, 34 Stat. 2954 ..... 7, 20
Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 5
Act of June 25, 1910, ch. 407, 36 Stat. 835 29
Act of Mar. 2, 1929, ch. 520-521, 45 Stat. 1502 9
Act of June 17, 1930, ch. 506, 46 Stat. 767 9
Art. VII(a), 46 Stat. 771 ..... 9, 10
Art. VII(b), 46 Stat. 771 9
Art. XII, 46 Stat. 772 10
Act of June 5, 1935, ch. 177, 49 Stat. 325 10

Statutes and rule—Continued: Page

Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*
Preamble, 53 Stat. 785 ..... 10, 26
Art. I(c), 53 Stat. 785 ..... 3, 26
Art. I(k), 53 Stat. 786 ..... 12, 22, 27, 43
Art. I(*l*), 53 Stat. 786 ..... *passim*
Art. III:
53 Stat. 787 27
53 Stat. 787-788 11
Art. IV, 53 Stat. 788 ..... *passim*
Art. VI, 53 Stat. 789-790 11
Art. VII, 53 Stat. 790 ..... 11, 29
Art. VIII, 53 Stat. 790 ..... 11, 12, 29, 40
Art. XI:
53 Stat. 790-791 ..... 12, 50
53 Stat. 791 ..... 12, 24, 50
Art. XII, 53 Stat. 791 11
Art. XVI, 53 Stat. 792 12
McCarran Amendment, 43 U.S.C. 666 13
Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e) 20, 43
Reclamation Act, ch. 1093, 32 Stat. 388 5
§§ 4-5, 32 Stat. 389 (43 U.S.C. 431, 439, 461) 19, 43
§8, 32 Stat. 390 (43 U.S.C. 383) 23, 41, 45
Reclamation Project Act of 1939, ch. 418, § 9, 53 Stat. 1193:
§ 9(c), 53 Stat. 1194-1195 (43 U.S.C. 485h(c)) 43
§ 9(d), 53 Stat. 1195 (43 U.S.C. 485h(d)) 20
§ 9(e), 53 Stat. 1196 (43 U.S.C. 485h(e)) 43
28 U.S.C. 1251(b)(2) 51
43 U.S.C. 423d 43

Statutes and rule—Continued: Page

43 U.S.C. 423e 43
43 U.S.C. 477 46
1905 N.M. Laws 277 (ch. 102, § 22) 6, 40
1907 N.M. Laws 85-86 (ch. 49, § 40) 6, 40
N.M. Stat. Ann. § 72-15-23 (1997) 42
Fed. R. Civ. P. 12(b)(6) 2, 21, 25

Miscellaneous:

Black's Law Dictionary:
(2d ed. 1910) 38
(9th ed. 2009) 38
Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf 8, 19, 29, 31
Fund for Reclamation of Arid Lands, H.R. Doc. No. 1262, 61st Cong., 3d Sess. (1911) 29
Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* (1938) ..... *passim*
Official Proceedings of the Twelfth National Irrigation Congress (Guy E. Mitchell ed., 1905) 5
U.S. Dep't of the Interior, *Rio Grande Federal Reclamation Project New Mexico-Texas* (1936) 30
U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-1904*, H.R. Doc. No. 28, 58th Cong., 3d Sess. (1905) 4

Miscellaneous—Continued: Page

Waters of the Rio Grande & Its Tributaries, H.R. Doc. No. 39, 62d Cong., 1st Sess. (1911) 4

In the Supreme Court of the United States

No. 141, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO NEW MEXICO'S MOTION TO DISMISS TEXAS'S COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

JURISDICTION

The Court granted Texas's motion for leave to file a bill of complaint on January 27, 2014. The Court granted the United States' motion for leave to intervene as a plaintiff on March 31, 2014. On April 30, 2014, New Mexico filed a motion to dismiss Texas's complaint and the United States' complaint in intervention. The jurisdiction of this Court rests on Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. 1251(a) and (b)(2).

STATEMENT

A. Introduction

The State of Texas has filed a complaint to enforce its rights under the Rio Grande Compact (Compact).

See Act of May 31, 1939, ch. 155, 53 Stat. 785; Tex. Compl. App. 1-20. The Compact apportions the water of the Rio Grande Basin among the States of Colorado, New Mexico, and Texas. Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir, a federal Bureau of Reclamation (Reclamation) project. Elephant Butte Reservoir is approximately 105 miles north of the Texas state line. That reclamation project was authorized, constructed, and already was delivering water pursuant to contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact.

Texas complains that New Mexico has depleted Texas's equitable apportionment under the Compact by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that flows into Texas. At the Court's invitation, the United States filed a brief as amicus curiae after Texas filed its motion for leave to file a complaint, recommending that the Court grant Texas leave to file its complaint. On January 27, 2014, the Court granted Texas leave to file its complaint and invited New Mexico to file a motion to dismiss, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6).

After the Court granted leave for Texas to file its complaint, the United States filed a motion for leave to intervene as a plaintiff and a proposed complaint in intervention based on several distinct federal interests that are at stake in this dispute over the interpreta-

tion of the Compact. On March 31, 2014, the Court granted the United States' motion for leave to intervene.

New Mexico has moved to dismiss the complaints filed by Texas and the United States. New Mexico contends that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's operations downstream of Elephant Butte Reservoir are controlled by state law, and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users. This brief is filed in response to New Mexico's motion to dismiss.

B. The Rio Grande Basin

The Rio Grande River rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville. Tex. Br. in Supp. of Compl. 5-6 & n.2; Tex. Br. in Supp. of Compl. App. A1 (map).

The Compact defines the Rio Grande Basin as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Fort Quitman is located about 80 miles southeast of El Paso. The Basin is approximately 700 miles long and has a drainage area of approximately 34,000 square

miles. Nat'l Res. Comm., *Regional Planning, Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 7, 296, 299 (1938) (*Joint Investigation*).

C. The Rio Grande Project

1. In the 1890s, regular water shortages along the lower Rio Grande prompted the Mexican government to press claims against the United States, alleging that shortages were due to increased diversions upstream. *Joint Investigation* 8, 73. In response, in 1896, the Department of the Interior (Interior) imposed an embargo on any new use of federal land for diversion works to take water from the Rio Grande in Colorado and the Territory of New Mexico. *Id.* at 8; see *Waters of the Rio Grande & Its Tributaries*, H.R. Doc. No. 39, 62d Cong., 1st Sess. 2 (1911). Interior also continued to investigate the potential for storage and irrigation projects in the upper Rio Grande Basin, which is the portion of the river above Fort Quitman. *Joint Investigation* 8, 73.

In 1904, at an Irrigation Congress attended by representatives of the New Mexico Territory, the State of Texas, and other western States, Reclamation presented detailed results of an engineering analysis and proposed to build a dam near Engle, New Mexico, at the current site of Elephant Butte Reservoir. See U.S. Geological Survey, *Third Annual Report of the Reclamation Service 1903-4*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 395-420 (1905). Reclamation further recommended that water from the reservoir be delivered to Texas and New Mexico in amounts proportional to the irrigable lands within each State. *Id.* at 425. Representatives from Texas and New Mexico, as

well as a delegation from Mexico, "heartily endorse[d] and approve[d]" the project "as a happy solution of a vexed question that has embarrassed the parties interested." See *Official Proceedings of the Twelfth National Irrigation Congress* 107 (Guy E. Mitchell ed., 1905).

2. The Reclamation Act, enacted in 1902, provided authorization and funding for irrigation works in various States, as well as the Territory of New Mexico. See Reclamation Act, ch. 1093, 32 Stat. 388. In 1905, Congress extended the 1902 Act to "the portion of the State of Texas bordering upon the Rio Grande" that could be irrigated by water from the proposed reservoir at Elephant Butte. See Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The Secretary of the Interior (Secretary) was authorized to proceed with construction of the dam only after determining that there was "sufficient land in New Mexico and in Texas which can be supplied with the stored water" at a price sufficient to reimburse the federal government for the cost of the project. *Ibid.*

In 1906 and 1908, the United States filed notices with the Territory of New Mexico of the United States' intent to utilize specified waters of the Rio Grande. *Joint Investigation* 73. The 1906 filing provided notice that the United States intended to use "730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River" in what would become the Rio Grande Project (Project). Mot. to Dismiss App. 8-9. In 1908, Reclamation provided notice that the United States intended to use "[a]ll the unappropriated water of the Rio Grande and its tributaries, said water to be diverted

or stored from the Rio Grande River" in the Project. *Id.* at 13. Upon submitting such notices, the unappropriated "waters so described * * * shall not be subject to further appropriations under the laws of New Mexico." 1905 N.M. Laws 277 (ch. 102, § 22); 1907 N.M. Laws 85-86 (ch. 49, § 40).

The Rio Grande Project extends from San Marcial, New Mexico, a town located on the Rio Grande about 160 miles north of the New Mexico-Texas state line, down to Fort Quitman, Texas, about 80 miles southeast of El Paso. Construction of the Project began in 1910. Elephant Butte Reservoir, the largest storage facility, and a canal system and diversion dams, were completed in 1916. *Joint Investigation* 73. A system of drains was added by 1925, and construction of a second storage facility, Caballo Reservoir, was completed below Elephant Butte Reservoir in 1938. *Id.* at 73; see *id.* at 85.

The Project is designed to deliver more water than it releases from Elephant Butte and Caballo Reservoirs. That is because water delivered for irrigation is never completely consumed. Some portion of the initial deliveries seeps into the ground or flows off agricultural fields into drains. When these "return flows" get back to the river, they become part of the water that can be delivered to Project beneficiaries downstream. Return flows have historically comprised a significant part of the Project's deliveries. See *Joint Investigation* 47-49, 55, 100; *id.* at 49 ("In estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration.").

3. In 1906, Reclamation entered into contracts with two irrigation districts—the entities now known as Elephant Butte Irrigation District (EBID) in New Mexico, and the El Paso County Water Improvement District No. 1 (EPCWID) in Texas—for the irrigation of approximately 155,000 acres of land, 67,000 acres in Texas and 88,000 acres in New Mexico. *Joint Investigation* 83. Those acreages were confirmed in a contract between EBID and EPCWID that was signed on February 16, 1938. App., *infra*, 1a-4a. The 1938 contract provides that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in proportion of 67/155 thereof to the lands within [EPCWID], and 88/155 to the lands within [EBID]." *Id.* at 2a. Those proportions are roughly equivalent to 43% for EPCWID in Texas and 57% for EBID in New Mexico. The contract was also signed by the Assistant Secretary of the Interior. *Id.* at 4a.

4. In addition to the water that the Project delivers to EBID and EPCWID pursuant to contracts with Reclamation, the Project also delivers water to Mexico to fulfill the United States' obligations under a treaty between the United States and Mexico. Except during extraordinary drought, the treaty guarantees to Mexico 60,000 acre feet of water per year delivered from the Project. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., art. II, 34 Stat. 2954 (1906 treaty). Under Article I of the treaty, the United States agreed to begin delivering water to Mexico "[a]fter the completion of the proposed storage dam near Engle, New Mexico, and the distrib-

uting system auxiliary thereto, and as soon as water shall be available in said system for the purpose." 34 Stat. 2953-2954.

5. Today, Reclamation continues to calculate diversion allocations under the Project pursuant to the treaty and the 1938 contract between EBID and EPCWID, and also pursuant to a settlement agreement (the 2008 Operating Agreement) entered into by Reclamation, EBID, and EPCWID. Under that 2008 Operating Agreement, Reclamation uses a regression analysis showing how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. See Bureau of Reclamation, U.S. Dep't of the Interior, *Supplemental Environmental Assessment, Implementation of the Rio Grande Project Operating Procedures, New Mexico and Texas* 3-7, 12 (June 21, 2013), http://www.usbr.gov/uc/albuq/envdocs/ea/riogrande/op-Proced/Supplemental/Final-SuppEA.pdf (*Supplemental Environmental Assessment*). After subtracting Mexico's share of the water, Reclamation assigns 43% of the available water to EPCWID and 57% of the water to EBID. *Id.* at 13-14, 18.[1]

D. The Rio Grande Compact

The establishment of the Project helped to address concerns about water supply in southern New Mexico and western Texas by providing a reliable irrigation system. The embargo on use of federal land for large diversion works in Colorado and New Mexico was

---

[1] New Mexico has filed a suit in federal district court to challenge the 2008 Operating Agreement. See *New Mexico* v. *United States*, No. 11-CV-0691 (D.N.M. Aug. 8, 2011).

lifted in 1925, however, and operation of the Project did not address concerns about development upstream of Elephant Butte Reservoir that was depleting the water supply to the Project. Accordingly, in 1929, Congress authorized Colorado, New Mexico, and Texas to negotiate and enter into, subject to congressional approval, a compact or agreement "providing for an equitable division and apportionment" of the waters of the Rio Grande and its tributaries. Act of Mar. 2, 1929, ch. 520-521, 45 Stat. 1502.

To maintain the status quo on the river pending negotiation of a permanent compact, the States of Colorado, Texas, and New Mexico agreed to an interim compact, which Congress approved. Act of June 17, 1930, ch. 506, 46 Stat. 767. Article VII(a) of the interim compact called for a commission of three members composed of a representative appointed by the Governor of each State for purposes of concluding a compact "for the equitable apportionment of the use of the waters of the Rio Grande among said States." 46 Stat. 771. To preserve the rights and equities of each State pending completion of a final compact, Article VII(b) of the interim compact provided that the commission "shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of th[e] [interim compact]," *i.e.*, 1929. *Ibid.*

Article XII of the interim compact provided that "New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or

increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return." 46 Stat. 772.

The interim compact was extended to June 1, 1937, when the parties were unable to reach a permanent agreement, Act of June 5, 1935, ch. 177, 49 Stat. 325; see *Joint Investigation* 8-9, and the congressional Natural Resources Committee appointed a board to review the situation and recommend appropriate action, *Joint Investigation* 10. The board gathered facts about "the available water supply, the water uses and requirements, and the possibilities of additional water supplies by storage, importations[,] and salvage of present losses and wastes." *Id.* at 11. The Natural Resources Committee released the results of the investigation in 1937 in the comprehensive *Joint Investigation* report. With that information, and with the participation of a federal representative, see Art. VII(a), 46 Stat. 771, the States were able to negotiate a permanent compact.

The States signed the Rio Grande Compact on March 18, 1938, approximately one month after EPCWID and EBID entered into the contract confirming the acreage in each State that would receive Project water. See p. 7, *supra*. Congress approved the Compact the following year. 53 Stat 785. The Compact's preamble states that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and "for the purpose of effecting an equitable apportionment of such waters." Preamble, 53 Stat. 785.

Article III of the Compact requires Colorado to deliver water at the New Mexico state line in an amount determined by schedules that correspond to water quantities at various gaging stations. 53 Stat. 787-788.

Article IV requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is similarly determined by a schedule. 53 Stat. 788. In 1948, the Rio Grande Compact Commission, established under Article XII of the Compact, 53 Stat. 791, relocated the gage for measuring New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Tex. Compl. para. 13; Mot. to Dismiss. 11 n.2.

Article VI of the Compact establishes a mechanism for adjusting the delivery requirements of Colorado and New Mexico from year to year. The Compact compensates New Mexico and Colorado for over-deliveries and penalizes them for under-deliveries through a system of credits and debits. It establishes limits on the total amount of credits and debits that an upstream State may accrue, and also requires New Mexico and Colorado each to "retain water in storage [upstream of Elephant Butte Reservoir] at all times to the extent of its accrued debit." 53 Stat. 789-790.

Article VII provides that Colorado and New Mexico may not store additional water in reservoirs constructed after 1929 "whenever there is less than 400,000 acre feet of usable water in project storage," unless actual releases from the Project from the beginning of the calendar year have aggregated to more than an average of 790,000 acre feet per year. 53 Stat. 790. Article VIII permits Texas to demand that Colo-

rado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to bring the quantity of usable water in the Project to 600,000 acre feet. *Ibid.* The release of stored water under Article VIII is to be made at the greatest rate practicable and in amounts sufficient to allow for "a normal release of 790,000 acre feet * * * from project storage in that year." *Ibid.*

The combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project" is referred to in the Compact as "[p]roject storage." Art. I(k), 53 Stat. 786. The only other such reservoir is Caballo Reservoir, described above. See p. 6, *supra*. The Compact defines "[u]sable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

Article XI of the Compact states that Texas and New Mexico agree that upon the Compact's effective date, "all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 791.[2]

---

[2] Article XVI of the Compact provides that "[n]othing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to

E. The State Water Adjudication

A New Mexico state court is currently determining the rights to water of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 Docket entry (Docket entry) (N.M. 3d Jud. Dist. Sept. 24, 1996).

1. That action began in 1986, when EBID filed a complaint in New Mexico state court for an adjudication of water rights between Elephant Butte Reservoir and the New Mexico-Texas state line, naming the United States as a defendant under the waiver of sovereign immunity contained in the McCarran Amendment, 43 U.S.C. 666. The United States moved to dismiss the suit on the ground that the McCarran Amendment did not permit joinder of the United States unless the entire main stem of the Rio Grande in New Mexico—from the Colorado state line to the Texas state line—was to be adjudicated. The New Mexico Court of Appeals rejected that argument, concluding that the Compact effectively divided the Rio Grande into separate "river system[s]" for purposes of the McCarran Amendment. *Elephant Butte Irrigation Dist.* v. *Regents of N.M. State Univ.*, 849 P.2d 372, 373 (N.M. App.), cert. denied, 851 P.2d 481 (N.M. 1993) (Tbl.).

The New Mexico State Engineer next moved to dismiss the state water adjudication on the ground that the state court did not have jurisdiction over Project water users in Texas, who were indispensable parties. See *United States* v. *City of Las Cruces*, 289

---

the Indian Tribes, or as impairing the rights of the Indian Tribes." 53 Stat. 792.

F.3d 1170, 1178 (10th Cir. 2002) (discussing motion to dismiss state-court proceedings). After the state court denied that motion, the State Engineer agreed to realign as a plaintiff and commenced the current general stream adjudication. *Ibid.*

After the district court denied the State Engineer's motion, the United States filed an action to quiet title to water for the Project in federal district court on the ground that because the Project has interstate and international obligations to deliver water, the Project right should be fully adjudicated in one proceeding rather than in separate proceedings in New Mexico and Texas state courts. See 97-cv-00803 Docket entry No. 245, at 16-17, 21 (D.N.M. Aug. 22, 2000). The Tenth Circuit ordered that the action be stayed in favor of the state water adjudications, stating that the United States' suit was for "declaratory relief seeking a determination of the relative rights of the United States and the named defendants," and "[t]he question of whether and how Rio Grande water should be apportioned among states is not directly at issue." *City of Las Cruces*, 289 F.3d at 1185-1186, 1192-1193.

2. The state court has concluded that the Project's water right is a surface right only, and that the Project is not entitled to "groundwater." Docket entry, at 2 (Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/779-ordgrantstatemtndismiss.pdf (8/16/12 Order). The court acknowledged that there is "an interactive relationship between groundwater and surface water * * * within many New Mexico stream systems, including the Rio Grande reach downstream of Elephant Butte Dam," but the court stated that New Mexico law "nevertheless recognizes surface water

and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court explained that, under New Mexico law, "groundwater can only serve as the source of water for a groundwater right when a well has been drilled." 8/16/12 Order 2. The court concluded that because the Project only has structures in place to divert surface water, but no wells, and because the 1906 and 1908 notices filed with the New Mexico Territorial Engineer "do not indicate that the United States intended to establish a separate groundwater right," the United States only "has established a right to surface water under New Mexico law for purposes of the adjudication." *Id.* at 5-6.

The state court acknowledged that the Project relies on "reuse of water" in that the Project typically is able to deliver more water than is released from project storage. 8/16/12 Order 6. The court further acknowledged that "seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water." *Id.* at 7. The court concluded, however, that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." *Ibid.* (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). The court stated that "[d]etermining whether Project water retains its identity as Project water is a condition-specific and technical inquiry" that would need to be determined in administrative proceedings before the State Engineer. *Ibid.*

The state court has also quantified the United States' right to store water, to release from storage a normal annual release of 790,000 acre feet, and to divert water at diversion dams in New Mexico "without limitation on the diversion amount." Docket entry, at 2-3 (Feb. 17, 2014), https://lrgadjudication.nmcourts.gov/index.php/component/docman/doc_download/730-order-1-granting-sj-re-amnts-2-deny-sj-re-priority-3-deny-sj-to-pre-1906-clmnts-set-hrg7b86.pdf?Itemid=102 (2/17/14 Order).

The United States requested that the state court's quantification of the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre feet per year, as recognized by a Texas water-rights decree. Docket entry, at 2, 28 (Apr. 24, 2013), https://lrgadjudication.nmcourts.gov/index.php/component/docman/doc_download/524-united-states-memorandum-in-support-of-motion-for-summary-judgment7b86.pdf?Itemid=102; see *In re Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex. Oct. 30, 2006). The court declined to recognize the Project's right to deliver water sufficient to satisfy the Texas decree. 2/17/14 Order 3-4. The court explained that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." *Id.* at 4. The court did not mention the Project's need to deliver water to Mexico.

F. The Current Controversy

1. In this original action, Texas contends that once New Mexico delivers water to Elephant Butte Reser-

voir, as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. Tex. Compl. para. 4. Texas alleges that, contrary to that allocation, New Mexico has "increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground" downstream of Elephant Butte in New Mexico. *Id.* para. 18.

Texas contends that if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir in excess of Project allocations, deliveries of water to Project beneficiaries in Texas and to Mexico cannot be assured. Tex. Compl. para. 11. Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. *Id.* paras. 18, 19.

In particular, Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." Tex. Compl. para. 18. Those extractions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which in turn requires additional releases from Elephant Butte and thereby decreases the amount of water stored in the Reservoir for future delivery to Project users. *Ibid.* Texas alleges that New Mexico's actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas

state line, causing substantial and irreparable injury to Texas." *Id.* para. 19.

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Tex. Compl. 15-16.

2. In its brief opposing Texas's motion for leave to file a complaint, New Mexico contended, *inter alia*, that the Court should deny Texas leave to file because the United States was a required party that had not consented to joinder. Br. in Opp. 31-34. New Mexico contended that "the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project." *Id.* at 33. New Mexico explained that "[t]he United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas," and that "[a]ny decree entered in the absence of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir." *Id.* at 33-34.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene in this action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. In those documents, the United States described several distinct federal interests that are at stake in this dispute over the interpretation of the Compact.

First, the United States noted that the parties' dispute concerns water released from a federal project that Reclamation operates, including by setting the diversion allocations for Project water users down-

stream of Elephant Butte Reservoir. See p. 8, *supra* (describing 2008 Operating Agreement). The United States explained that if the Court were to determine in this action that New Mexico does not violate the Compact by allowing New Mexico users to extract water that is hydrologically connected to the Rio Grande from below Elephant Butte Reservoir—either without a contract with the Secretary or in excess of their contractual amounts—that conclusion would undermine the assumptions underlying the United States' calculation of diversion allocations between EBID and EPCWID pursuant to the 2008 Operating Agreement. Mem. in Supp. 5-6. That is because the effect of the 2008 Operating Agreement, under which Reclamation determines how much water is available for delivery using a regression analysis that is based on 1951-1978 hydrological conditions, is that EBID agrees to forgo a portion of its Project deliveries to account for changes in Project efficiency caused by groundwater pumping in New Mexico. *Supplemental Environmental Assessment* 4, 12.

Second, the United States identified its interest in ensuring that New Mexico water users who do not have contracts with the Secretary for delivery of Project water, or who use Project water in excess of the amounts in their contracts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries. Mem. in Supp. 7-8. The United States explained (*id.* at 7) that, since 1902 and consistently through subsequent amendments and supplements to reclamation law, Congress has required a contract with the Secretary as a prerequisite to obtaining water from a reclamation project. See, *e.g.*, Reclamation Act, ch. 1093, §§ 4-5 (1902), 32 Stat. 389

(43 U.S.C. 431, 439, 461); Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e). This statutory requirement, the United States continued (Mem. in Supp. 8), has been in place and applicable to the Project since the Compact was signed in 1938, and it was specifically reaffirmed by Congress in the same year that it approved the Compact. See Reclamation Project Act of 1939, ch. 418, § 9(d), 53 Stat. 1195 (43 U.S.C. 485h(d)).

Third, the United States pointed to its interest in ensuring that New Mexico water users downstream of Elephant Butte Reservoir do not intercept or interfere with the delivery of Project water to Mexico pursuant to the international treaty obligation of the United States. See pp. 7-8, *supra*. The United States explained that, even with the 2008 Operating Agreement in place, uncapped use of water below Elephant Butte Reservoir could reduce Project efficiency to a point where 60,000 acre feet of water per year could not be delivered to Mexico. Mem. in Supp. 8. The United States further explained that, under Article II of the 1906 treaty, in the case of extraordinary drought, the quantity of water that the United States must deliver to Mexico is tied to the quantity of surface water delivered to irrigation districts in the United States. See 34 Stat. 2954 (in the case of extraordinary drought, "the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States"). If surface water deliveries to irrigation districts in the United States are being reduced as a result of extractions by water users who either do not have contracts with the Secretary or are using water in excess of contractual

amounts, the United States would have to carefully consider whether Article II of the treaty would call for a proportional reduction of its delivery obligation to Mexico during an extraordinary drought. Mem. in Supp. 8-9.

In its complaint in intervention, the United States requested a declaration that New Mexico (i) may not permit New Mexico water users who do not have contracts with the Secretary to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico, (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and (iii) must affirmatively act to prohibit such interception and interference. U.S. Compl. 5. The United States also requested injunctive relief and an order mandating that New Mexico affirmatively prevent such interception and interference. *Ibid.*

On March 31, 2014, the Court granted the United States' motion for leave to intervene.

3. As proposed by the Court's order granting Texas leave to file its complaint, New Mexico has filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contends (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico further contends that the Project's water rights below Elephant Butte Reservoir are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project

deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61).

SUMMARY OF ARGUMENT

I. The Court should deny New Mexico's motion to dismiss because Texas and the United States have stated claims under the Compact upon which relief can be granted.

A. The States entered the Compact to effect an equitable apportionment of the waters of the Rio Grande above Fort Quitman, Texas. Texas receives its equitable apportionment under the Compact in the form of water released by the Project "in accordance with irrigation demands," Art. I(*l*), 53 Stat. 786, after the water is delivered into "[p]roject storage" by New Mexico at Elephant Butte Reservoir, Art. I(k), IV, 53 Stat. 786, 788. Texas's apportionment of water under the Compact includes seepage and return flows from Project deliveries. The Compact also protects hydrologically connected groundwater, to the extent that pumping the groundwater has an effect on the amount of water that is available for delivery to Texas water users.

B. Because Texas receives its equitable apportionment under the Compact through Project deliveries for irrigation, New Mexico's interference with those deliveries, including by taking return flows, seepage, or hydrologically connected groundwater, is a violation of the Compact. New Mexico itself not required to deliver any particular amount of water to the New Mexico-Texas state line. But New Mexico does have a duty under the Compact to prevent its water users from diverting Project water that Recla-

mation releases from the reservoir to meet irrigation demands in Texas and hydrologically connected groundwater.

New Mexico agreed in Article I(*l*) of the Compact that water delivered into project storage at Elephant Butte would become "[u]sable water" for the Project to release in accordance with irrigation demands. 53 Stat. 786. By taking water below Elephant Butte Reservoir that was released by the Project for an agreed-upon purpose, New Mexico is breaching the parties' agreement. By intercepting Project water released from Elephant Butte Reservoir, New Mexico is also in breach of its obligation under Article IV of the Compact to "deliver" the water—and thus to relinquish control of it—at Elephant Butte Reservoir. 53 Stat. 788.

C. New Mexico contends that its obligations with respect to water that is released from Elephant Butte Reservoir arise under state law, not under the Compact, and that any complaints about New Mexico's interference with Project deliveries must be addressed through a suit brought by the United States under New Mexico state law to protect the Project right from interference by junior groundwater appropriators. Both of those premises are flawed.

1. Although Section 8 of the Reclamation Act, 43 U.S.C. 383, states that the Act is not intended to interfere with state laws relating to the control, appropriation, use, or distribution of water used in irrigation, the application of state law cannot override other specific directives of Congress. The Compact is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. New Mexico's interference with

Project deliveries must also comply with reclamation law, which has long established that only entities having contracts with the United States may receive deliveries of project water, including seepage and return flows. New Mexico's authority to regulate water below Elephant Butte Reservoir is also subject to the United States' treaty obligation to deliver 60,000 acre feet of water per year to Mexico for irrigation.

2. Furthermore, New Mexico's contention that the United States can protect the Project water right from interference by making a priority call on the river, to be decided by the New Mexico State Engineer, is unpersuasive. A State cannot be its own judge in a controversy with a sister State, and there is no justifiable reason why Texas's Compact apportionment must be defined by the New Mexico State Engineer. Moreover, the Project right that New Mexico contends the United States can enforce through state proceedings explicitly does *not* include a right to deliver water to Texas under the Compact. Finally, because the New Mexico state trial court has concluded that the Project right does not include "groundwater," a call on the river to shut down junior groundwater pumpers would not be sufficient to protect Texas's Compact apportionment.

3. Finally, Article XI of the Compact, which provides that nothing in the Compact "shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another," 53 Stat. 791, clarifies one type of claim that can be brought under the

Compact, but it does not eliminate claims based on other violations of the Compact.

II. Even if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the United States, the Court's exercise of its original jurisdiction over the United States' complaint is appropriate in this case.

The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and the United States has a right protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands, and to Mexico. The importance of this case to each of the sovereigns involved warrants the Court's exercise of its original jurisdiction.

ARGUMENT

New Mexico has filed a motion to dismiss the complaints in the nature of a motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure, which provides for dismissal of a complaint that fails to state a claim upon which relief can be granted. Under Rule 12(b)(6), a court must proceed "on the assumption that all the allegations in the complaint are true." *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 555 (2007). Applying that principle here, the Court must accept as true that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts." U.S. Compl. para. 13; see Tex. Compl. paras. 18-19. The Court

must also accept as true that "these extractions have a direct adverse impact on the amount of water delivered to Texas." Tex. Compl. para. 18; see U.S. Compl. para. 14 ("[E]xtraction of water that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico.").

The relevant question is whether, assuming the factual allegations in the complaint are true, the plaintiff has "state[d] a claim to relief that is plausible on its face." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570)). For the reasons set forth below, Texas and the United States have alleged a violation of the Rio Grande Compact by New Mexico, and New Mexico's motion to dismiss should therefore be denied.

I. TEXAS AND THE UNITED STATES HAVE STATED A CLAIM UNDER THE COMPACT UPON WHICH RELIEF CAN BE GRANTED

A. Texas Receives Its Equitable Apportionment Under The Compact Through Project Deliveries

1. The preamble to the Compact declares that the States' purpose in entering into the Compact was to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." 53 Stat. 785. Consistent with that purpose, the Compact defines the "Rio Grande Basin" as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." Art. I(c), 53 Stat. 785. Accordingly, the water the States agreed to equitably apportion through the Compact extends down to Fort Quitman, Texas, which

is 80 miles southeast of El Paso, at the southernmost point of the Rio Grande Project's irrigation works.

To accomplish that apportionment, the Compact first requires Colorado to deliver a specific quantity of water to the New Mexico state line. Art. III, 53 Stat. 787. Colorado's equitable apportionment thus constitutes all of the water above the Colorado-New Mexico state line, minus Colorado's Article III delivery requirement. The Compact then requires New Mexico to deliver a specific quantity of water to Elephant Butte Reservoir. Art. IV, 53 Stat. 788. New Mexico's equitable apportionment thus includes in the first instance all of the water between the Colorado-New Mexico state line and Elephant Butte Reservoir, minus New Mexico's Article IV delivery requirement.

Once New Mexico "deliver[s]" the water to Elephant Butte Reservoir as required by Article IV (*i.e.*, into "[p]roject storage," Art. I(k), 53 Stat. 786), New Mexico relinquishes control over that water. It becomes "[u]sable water" in "project storage," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. In its operation of the Project, Reclamation controls the releases for those uses described in Article I(*l*) pursuant to the federal contracts and the 1906 treaty that were already in place when the Compact was signed, and pursuant to the agreement between EBID and EPCWID—signed one month before the Compact was signed—to freeze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for EBID and 43% for EPCWID. App., *infra*, 1a-4a. As the Compact Commissioner for Texas explained in response to a letter from an attorney for downstream

Rio Grande interests who inquired why the Compact did not provide for a specific amount of water to be delivered to Texas, see Mot. to Dismiss App. 29-30, "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation" in which "the total area is 'frozen' at the figure representing the acreage [then] in cultivation," *id.* at 32; see *id.* at 26.

By operation of these provisions, New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water, through the Project, in the form of water released by the Project "in accordance with irrigation demands." Art. I(*l*), 53 Stat. 786. Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in EBID and EPCWID, respectively.

2. Texas's apportionment of water under the Compact in the form of deliveries from the Project, and New Mexico's apportionment below Elephant Butte Reservoir also in the form of such deliveries, include water from seepage and return flows from Project deliveries. That operating principle is consistent with the Project's design and historical practice, and it is an important assumption underlying Reclamation's current method of calculating diversion allocations among EBID, EPCWID, and Mexico pursuant to the 2008 Operating Agreement. See p. 8, *supra*. Reclamation calculates how much water is available for delivery (including seepage and return flows) from a given volume of water released from the Project based on 1951-1978 hydrological conditions. See *Supple-*

mental Environmental Assessment 3-7, 12. Under those conditions, for example, the release of 763,842 acre feet of water from the Project would result in the delivery of 931,897 acre feet of water, because of return flows making their way back into the river for further delivery downstream. *Id.* at 12.[3] Reclamation subtracts the 60,000 acre feet of water due to Mexico pursuant to the treaty, and then assigns 43% of the available water to EPCWID in Texas and 57% to EBID in New Mexico. *Id.* at 13-14, 18.

Reclamation's assumption in its calculation that seepage and return flows from Project releases are available for re-use downstream is based on the clear historical understanding of the Project's intended operation. In 1911, in a report to Congress that justified issuing certificates of indebtedness against the reclamation fund to complete projects for which that fund had proved insufficient, see Act of June 25, 1910, ch. 407, 36 Stat. 835, Reclamation described the importance of return flows to the Project. It stated that "[i]n addition to losses in the distribution system there will be losses in transit between the reservoir and diversion dams. * * * The losses in transit, however, will be partly offset by the return seepage in upper parts of the valley, which will be available for diversion lower down." *Fund for Reclamation of Arid Lands*, H.R. Doc. No. 1262, 61st Cong., 3d Sess. 106 (1911).

---

[3] 763,842 acre feet of usable water in the Project is what Reclamation considers to be "Full Project supply." *Supplemental Environmental Assessment* 12. Articles VII and VIII of the Compact are designed to maintain an average annual release from the Project of 790,000 acre feet. See 53 Stat. 790.

After the dam at Elephant Butte was constructed, and a few years before the Compact was signed, Reclamation issued a report describing the water supply for the Project. That report stated that "[r]eturn flow developed by the construction of the project drainage system is available for rediversion at the successive diversion points through the 140-mile length of the irrigated valleys constituting the Rio Grande project." U.S. Dep't of the Interior, *Rio Grande Federal Reclamation Project New Mexico-Texas* 3 (1936). The report explained that "[t]he combination of released stored water, return flow, and a portion of the tributary side inflow has proven to be an adequate, reliable, and dependable supply for the 155,000 acres to which the development of the organized Federal project has been limited plus an allowance of 60,000 acre-feet per annum to Mexico." *Ibid.*

Similarly, the 1937 *Joint Investigation*, which included a comprehensive analysis of water use and supply in the Rio Grande Basin and formed the basis for the Compact, makes clear that return flows have historically comprised a significant portion of the Project's deliveries. See *id.* at 47-49, 55, 100. The Natural Resources Committee explained that, "[i]n estimating the water supply for the major units of the upper basin under given future conditions of irrigation development, the return water is an important consideration." *Id.* at 49.

3. The Compact necessarily limits the extraction of hydrologically connected groundwater, to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands.[4]

---

[4] In the past, New Mexico has taken inconsistent positions on the Compact's apportionment of water below Elephant Butte Reser-

When water is extracted from the ground at places downstream of Elephant Butte Reservoir, it impairs deliveries of Project water. That is because pumping either directly intercepts Project water that would otherwise return to the river, or alters groundwater gradients and water table elevations, thereby preventing Project water that seeps into the ground from flowing toward the river as it would absent the pumping. See *Supplemental Environmental Assessment* 5-6. The Project may then have to release additional water from storage to offset such extractions in order to maintain delivery of any given quantity of water to downstream users. Consequently, extraction of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico. See U.S. Compl. para. 14.

This Court has previously recognized that groundwater pumping that interferes with the equitable apportionment of water under an interstate compact must be counted toward a State's use of its equitable apportionment. In *Kansas* v. *Nebraska*, 525 U.S. 1101 (1999), the State of Kansas filed a complaint against Nebraska alleging that Nebraska was violating the Republican River Compact by reducing the inflow of

---

voir. See *City of El Paso* v. *Reynolds*, 563 F. Supp. 379, 382, 386 (D.N.M. 1983) (explaining that New Mexico argued that it could not allow the export of groundwater from southern New Mexico because the Compact "apportions the surface waters of the Rio Grande between the states of New Mexico and Texas and controls the use of hydrologically related ground water," but stating that New Mexico had previously taken the position in *Texas* v. *New Mexico*, No. 9, Original, that the Compact "does not apportion the Rio Grande between New Mexico and Texas").

water into Harlan County Reservoir—a storage facility for a reclamation project in Nebraska—through pumping of hydrologically connected groundwater in Nebraska upstream of the reservoir. The Court invited Nebraska to test its theory that groundwater pumping was not subject to the Compact in a motion to dismiss, and the Court referred the ensuing motion to a Special Master. *Kansas* v. *Nebraska*, 527 U.S. 1020 (1999); 528 U.S. 1001 (1999). The Master recommended that Nebraska's motion be denied, concluding that "[t]o whatever extent groundwater pumping depletes the stream flow in the Basin, such depletion constitutes consumption of a part of the virgin water supply and must be counted against the allocated share of the pumping State." See First Report of the Special Master (Subject: Nebraska's Mot. to Dismiss) 1-3, in *Kansas* v. *Nebraska*, No. 126, Original (Jan. 28, 2000); see *id.* at 34-35 ("[A] compact apportioning stream flows can restrict groundwater usage even though the term 'groundwater' is not used."). After reviewing the Master's report, the Court denied Nebraska's motion to dismiss. *Kansas* v. *Nebraska*, 530 U.S. 1272 (2000).

Kansas v. *Nebraska* rests on the recognition that, if pumping of hydrologically connected groundwater that affects surface flow does not count toward a State's apportionment under an interstate compact, then the fundamental purpose of the compact—to equitably apportion water between States—would be frustrated. First Report of the Special Master 2-3. An upstream State could unilaterally increase its share of water by pumping hydrologically connected groundwater, thereby decreasing the amount of water that flows downstream. *Ibid.*; see also *Kansas* v.

Colorado, 514 U.S. 673, 693-694 (1995) (agreeing with Special Master's conclusion that post-compact pumping in Colorado had caused material depletions of the usable state-line flow of the Arkansas River, in violation of the Arkansas River Compact). In this case, groundwater that is hydrologically connected to the Rio Grande River and its tributaries must be included within the Compact's protection if the Compact is to ensure the effectuation of an equitable apportionment to Texas, as its preamble makes clear it is to do.

B. New Mexico's Interference With Project Deliveries To Texas, As Alleged In The Complaints, Is A Violation Of The Compact

Because Texas's receipt of its share of the equitable apportionment under the Compact is accomplished through the instrument of the Project—by Project deliveries of "[u]sable water" for irrigation purposes, Art. I(*l*), 53 Stat. 786—New Mexico's interference with Project deliveries of that water, including by drawing on seepage, return flows, and hydrologically connected groundwater, is a violation of the Compact.

New Mexico contends (Mot. to Dismiss 27-37) that its only obligation under the Compact is to deliver water to Elephant Butte Reservoir, and that "[no] term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas stateline or to prevent diversions of water after New Mexico has delivered it at Elephant Butte." *Id.* at 27-28. The United States agrees that New Mexico has no quantified state-line delivery obligation as such under the Compact. But the Compact *does* require New Mexico, downstream of Elephant Butte Reservoir, to prevent diversions of Project water and of hydrologically connected groundwater that reduce return flows

of Project water, thereby interfering with Texas's equitable apportionment.

1. It is undisputed that the Compact does not require New Mexico itself to deliver any specific amount of water to the Texas state line. New Mexico's delivery obligation is instead to deliver water to Elephant Butte Reservoir, Art. IV, 53 Stat. 788, 105 miles upstream from Texas. As the Compact Commissioner for Texas explained, a primary reason why the Compact does not impose a state-line delivery obligation on New Mexico is because "the source of supply for all lands above Fort Quitman and below Elephant Butte reservoir * * * is the reservoir itself," and New Mexico could not be expected to guarantee a specific amount of water at the state line when "the reservoir is under the control of an entirely independent agency," *i.e.*, Reclamation. Mot. to Dismiss App. 25-26. The Commissioner further explained that a state-line delivery requirement was infeasible "by reason of the irregular contour of the boundary between the two States and other physical facts," including the "practical[] impossib[ility] [of] measur[ing] the water passing the state line at the various places in the river channel and in the canals, laterals[,] and drains." *Id.* at 25.

Instead, the Compact requires New Mexico to deliver Texas's share of the equitable apportionment upstream of the state line, at Elephant Butte Reservoir, as part of the *total* amount of water New Mexico must deliver to the Project there. The Project, which had long been operating when the Compact was adopted, then delivers water to the irrigation districts for distribution to water users in New Mexico and Texas. The fact that the Compact's apportionment to Texas is effectuated through the intermediary of the

Project in no way detracts from the protection that the express terms of the Compact afford to Texas. In this respect, the result is the same as if Reclamation (or Texas) had constructed a pipeline to deliver water directly from Elephant Butte Reservoir to Texas and the Compact expressly incorporated that means of delivery of Texas's share of the water. Just as such a Compact term would prohibit New Mexico from siphoning off water from the pipeline for use by farmers in New Mexico, the Compact to which New Mexico and Texas actually agreed prohibits New Mexico from siphoning off water from the Project after it has been released from Elephant Butte Reservoir for authorized downstream deliveries, including to Texas. And if Texas were to obtain more than its share of water, New Mexico, like Texas here, could bring an action under the Compact to protect its share of the equitable apportionment.

Because Texas's apportionment is accomplished first by New Mexico's obligation to deliver water to the Project at Elephant Butte Reservoir and then through operation of the Project, New Mexico's argument that the Compact does not impose a delivery obligation on New Mexico at its border with Texas is simply beside the point. Thus, it is of no moment, as New Mexico argues, that no express term of the Compact requires a state-line delivery (Mot. to Dismiss 29-30), that the drafters knew how to include a state-line delivery requirement because they did so for Colorado at the New Mexico state line in Article III of the Compact (*id.* at 30-31), that various courts have described New Mexico's delivery obligation as being at Elephant Butte Reservoir (*id.* at 31-32), that other compacts contain state-line delivery requirements (*id.*

at 32-33),[5] and that the negotiation history of the Compact confirms that New Mexico's delivery obligation is not at the state line (*id.* at 34-36).

2. Although New Mexico does not control releases from the Project and in that respect cannot be held responsible for ensuring that any particular amount of water reaches Texas (Mot. to Dismiss 60), it hardly follows that New Mexico is free of any duty under the Compact to prevent its water users from interfering with Project deliveries by diverting Project water that Reclamation releases from the reservoir to meet irrigation demands in Texas as well as hydrologically connected groundwater. New Mexico contends (*id.* at 36-37, 61-62) that no Compact term expressly prohibits New Mexico from interfering with Project deliveries to Texas, and the complaints therefore would require the court to "read absent terms" into the Compact (*id.* at 28, 36, 62), such as an implied covenant of good faith and fair dealing, which the Court declined to recognize under the compact at issue in *Alabama* v.

---

[5] The Compacts that New Mexico cites are distinguishable from the Rio Grande Compact in any event. Contrary to New Mexico's assertion, under the Pecos River Compact, most of the water to be delivered at the Texas state line is not stored in the upstream reservoir, but comes from other sources. See *Texas* v. *New Mexico*, 462 U.S. 554, 574 (1983) ("In its natural state, the Pecos actually dries up for long periods of time between Alamogordo [Dam] and the state line, so the water that crosses the state line is not the same water that passes the dam, except in periods of extreme flood."). With respect to the Arkansas River Compact, the parties separately agreed on an operating plan to divide the reservoir waters more than 30 years after the Compact was negotiated. That plan did not require Kansas to give up its claims that pumping in Colorado was diminishing the flow of the River in violation of the Compact. See *Kansas* v. *Colorado*, 514 U.S. at 691-692.

North Carolina, 560 U.S. 330, 351-352 (2010). That is incorrect. New Mexico's obligation to refrain from intercepting or interfering with Project deliveries to Texas is reflected in the Compact's express terms.[6]

Article I(*l*) of the Compact states that water delivered by New Mexico into project storage is "[u]sable water" that is "available for release [by the Project] in accordance with irrigation demands" downstream of Elephant Butte Reservoir and "for deliver[y] to Mexico." 53 Stat. 786. By diverting water below Elephant Butte Reservoir that is committed to agreed-upon purposes under the Project and the Compact, New Mexico is breaching the parties' agreement. Once New Mexico delivers water to Elephant Butte Reservoir, the State may not allow its water users (other than EBID) to take surface water from the Rio Grande, to intercept Project return flows or seepage, or to pump hydrologically connected groundwater

---

[6] In *Alabama* v. *North Carolina*, Alabama had claimed that North Carolina violated an implied duty of good faith and fair dealing by withdrawing from an interstate compact, even though the compact expressly permitted withdrawal. 560 U.S. at 351-352. The Court stated that it was "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented." *Id.* at 352. The Court stated that it would not "order relief inconsistent with [the] express terms" of a compact, "no matter what the equities of the circumstances might otherwise invite." *Ibid.* (citation and internal quotation marks omitted). In *Northwest, Inc.* v. *Ginsberg*, 134 S. Ct. 1422 (2014), however, the Court drew a distinction between invoking the covenant of good faith and fair dealing to impose on the parties obligations not affirmatively set forth in an agreement, and invoking the covenant "to effectuate the intentions of parties or to protect their reasonable expectations." *Id.* at 1431-1432 (citation omitted).

when to do so would impair the delivery of surface water and its return flows by the Project in response to irrigation demands.

New Mexico's reading of the Compact, including its view that New Mexico has no obligation to limit additional diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir (Mot. to Dismiss 40-45), is also inconsistent with the requirement in the Compact that New Mexico "deliver" a specific quantity of water to Elephant Butte Reservoir. See Art. IV, 53 Stat. 788. "Delivery" is generally understood to mean "[t]he formal act of transferring something" or "the giving or yielding possession or control of something to another." See *Black's Law Dictionary* 494 (9th ed. 2009); see also *Black's Law Dictionary* 349 (2d ed. 1910) (current edition when Compact was negotiated and signed) (defining "delivery" in the context of "conveyancing" as "[t]he final and absolute transfer of a deed * * * in such manner that it cannot be recalled by the grantor"); *Fox* v. *Young*, 91 S.W.2d 857, 859 (Tex. Civ. App. 1936) ("A delivery may be said to have been made whenever, at the time and place * * * the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer.").

As New Mexico concedes (Mot. to Dismiss 37-38, 39-40), when New Mexico "delivers" water to Elephant Butte Reservoir under the Compact, it relinquishes control of the water to the Project, as operated by Reclamation. The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries—who receive the Project water supply, including return flows derived from the re-

leased water—and for "deliver[y] to Mexico." Art. I(*l*), 53 Stat. 786.

New Mexico asserts (Mot. to Dismiss 44-45) it is significant that New Mexico's promise in the interim Compact—that it would not allow water rights above and below Elephant Butte Reservoir to "be impaired by new or increased diversion or storage within the limits of New Mexico," Art. XII, 46 Stat. 772—was not reiterated in those terms in the Compact. But because New Mexico agreed in the Compact to relinquish control over the water once it was delivered at Elephant Butte Reservoir, and because the Compact in turn apportions a share of that water to Texas through the Project, there was no need for the Compact to contain a further provision barring New Mexico from impairing vested rights below Elephant Butte Reservoir. New Mexico's agreement to relinquish control of the water at Elephant Butte Reservoir carried forward that commitment in a different manner, based on the Compact's incorporation of the Project as the means to deliver Texas's share of the water.

It is hard to imagine that Texas would have agreed to the Compact under New Mexico's contrary account of the Compact's negotiation—*i.e.*, that the omission of comparable language in the 1938 Compact constituted an affirmative authorization (by mere silence) for New Mexico to impair the "equitable apportionment" to Texas that the Compact expressly provides. It would also make little sense for the States to have given the Commissioner for Texas the authority under Article VIII of the Compact to demand that Colorado and New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued

debits sufficient to allow for a normal release of 790,000 acre feet per year from the Project, 53 Stat. 790, if New Mexico then could authorize depletions of the water that Reclamation releases downstream of Elephant Butte for Project uses.[7]

The complaints filed by Texas and the United States allege that New Mexico—through its water users downstream of Elephant Butte Reservoir who do not have contracts with the Secretary or who are using water not authorized by such contracts—is taking surface water from the Rio Grande and pumping hydrologically connected groundwater. U.S. Compl. para. 13; Tex. Compl. paras. 18-19.[8] Those actions are interfering with Texas's ability to receive

---

[7] New Mexico's duty to protect the Project water from interference is further reflected in its 1905 and 1907 territorial laws. In requiring Reclamation to give notice of the United States' intent to utilize the Territory's water for irrigation purposes, which the United States provided in 1906 and 1908, New Mexico agreed that such water "shall not be subject to further appropriations" and that "no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory." 1905 N.M. Laws 277 (ch. 102, § 22); 1907 N.M. Laws 85-86 (ch. 49, § 40).

[8] New Mexico does not appear to contest that there have been substantial diversions of surface water and hydrologically connected groundwater in New Mexico. Indeed, in New Mexico's challenge to the 2008 Operating Agreement that effectively requires EBID to account for changes in Project efficiency caused by groundwater pumping in New Mexico, see p. 8 & n.1, *supra*, New Mexico alleges that the use of water by the Project has "drastically changed" since the 2008 Operating Agreement went into effect "in that approximately 150,000 acre-feet less per year has been delivered to New Mexico than was delivered prior to the 2008 Operating Agreement." 1:11-cv-00691 Docket entry No. 45, para. 46 (Feb. 14, 2012).

its equitable apportionment of the waters of the Rio Grande through Project deliveries. Tex. Compl. para. 18; U.S. Compl. para. 14. By intercepting water in this manner, New Mexico is in breach of its obligation under Article IV of the Compact to deliver and relinquish control of the water to the Project at Elephant Butte Reservoir, 53 Stat. 788, and its agreement that water in project storage would be used only by the Project to satisfy irrigation demands and for deliveries to Mexico, Art. I(*l*), 53 Stat. 786.

C. Texas Can Enforce Its Rights Under The Compact Through An Original Action In This Court

New Mexico nevertheless contends (Mot. to Dismiss 48-58) that "New Mexico's obligations with respect to Project water that is released below Elephant Butte arise under * * * state laws and authorities, not under the Compact" (*id.* at 59). It further contends that any complaints about New Mexico's interference with Project deliveries must be addressed through a suit brought by the United States "under New Mexico law to protect the Project right from interference by junior groundwater appropriators in New Mexico" (*id.* at 56; see *id.* at 59). Both of the premises underlying New Mexico's argument are flawed.

1. The Project is not administered solely pursuant to New Mexico state law. Section 8 of the Reclamation Act does provide that:

> [n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired

> thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws.

43 U.S.C. 383. But this Court has held that the application of state law under Section 8 of the Reclamation Act cannot override other specific directives of Congress. See, *e.g.*, *California* v. *United States*, 438 U.S. 645, 668 n.21, 670-679 (1978).

a. The Compact, which was approved by Congress, 53 Stat 785, is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2125 (2013); *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And in any event, the New Mexico legislature has enacted the Compact into state law, see N.M. Stat. Ann. § 72-15-23 (1997), and the Compact therefore limits New Mexico water users below Elephant Butte Reservoir from interfering with Project deliveries to Texas for irrigation as a matter of state law as well.

A State may adjust the rights of its citizens by entering into an interstate compact with the consent of Congress. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment of water in an interstate stream pursuant to a compact "is binding upon the citizens of each State and all water claimants"). Accordingly, even if New Mexico state law would permit New Mexico water users to pump groundwater that is hydrologically connected to the Rio Grande (see pp. 14-15, *supra* (summarizing New Mexico state trial court's decision that the Project's water right does not include "groundwater")), they are prohibited from doing so if the pumping interferes with the ability of Texas to

receive its Compact apportionment in the form of deliveries of Project water for irrigation, including seepage and return flows, as New Mexico agreed to in the Compact. See Art. I(k) and (*l*), 53 Stat. 786.

b. New Mexico's interference with Project deliveries is also contrary to federal reclamation law, which has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project. See §§ 4-5, 32 Stat. 389 (43 U.S.C. 431, 439, 461); §§ 45-46, 44 Stat. 648-650 (43 U.S.C. 423d, 423e); see also 43 U.S.C. 485h(c), (d) and (e).[9] The requirement of a contract for project water extends to seepage and return flows, which belong to Reclamation. See *Ide* v. *United States*, 263 U.S. 497, 505 (1924) (holding that a federal reclamation project is entitled to seepage water for irrigation purposes). That holding has been specifically applied to the Rio Grande Project. See *Bean* v. *United States*, 163 F. Supp. 838, 845 (Ct. Cl.) (citing *Ide* and holding that "[t]here can be no doubt * * * that the Reclamation Bureau, under its appropriations of 1906 and 1908, had the control and the right to prescribe the use of the seepage from lands within the project, as well as the original use of the waters"), cert. denied, 358 U.S. 906 (1958); see also *Montana* v. *Wyoming*, 131 S. Ct. 1765, 1775-1777 (2011) (quoting *Ide* and

---

[9] Under the Reclamation Act, contracts with the Secretary were formed through petitions filed by individual water users. Those individual petitions were generally replaced with contracts between water users' organizations and the Secretary. See, *e.g.*, 43 U.S.C. 423d, 423e, 477. Regardless of whether the contracts were between the Secretary and individuals or the Secretary and water users' organizations, a contract was required to obtain Reclamation water.

describing the doctrine of recapture, pursuant to which an appropriator is entitled to the "exclusive control [of his appropriated water] so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation") (citation omitted; brackets in original).

Other federal courts have similarly described a reclamation project's right to control the disposal of seepage and return flows from project deliveries. In *Israel* v. *Morton*, 549 F.2d 128 (1977), the Ninth Circuit explained:

> Project water * * * would not exist but for the fact that it has been developed by the United States. It is not there for the taking (by the landowner subject to state law), but for the giving by the United States. The terms upon which it can be put to use, and the manner in which rights to continued use can be acquired, are for the United States to fix.

Id. at 132-133. The premise that "[p]roject water * * * would not exist but for the fact that it has been developed by the United States," is particularly clear in the Rio Grande Basin, because all but a very small portion of whatever water there is downstream of Elephant Butte Reservoir can be traced back to the Project. Tributaries between Elephant Butte Reservoir and Fort Quitman "consist only of arroyos, dry most of the time but subject to flashy floods," and there is no significant tributary inflow downstream of Caballo Reservoir. *Joint Investigation* 23.

In *Strawberry Water Users Ass'n* v. *United States*, 576 F.3d 1133 (2009), the Tenth Circuit explained:

> From the very beginning of the reclamation program, Congress has restricted the use of water released from reclamation projects, and these restrictions are exceptions to the general rule embodied in 43 U.S.C. [] 383 that state law governs the control, appropriation, use, and distribution of reclamation water * * * Federal law recognizes that a change in the use of project water from irrigation to municipal and industrial use * * * requires a contract with the Secretary.

Id. at 1148 (citations omitted). Accordingly, once water is delivered to Elephant Butte Reservoir by New Mexico, water users below the reservoir cannot take water, including return flows and water that has seeped into the ground, except as authorized by a contract with the United States.[10]

c. New Mexico's authority to regulate water below Elephant Butte Reservoir is also subject to the United States' obligation to deliver 60,000 acre feet of water per year to Mexico for irrigation, pursuant to the 1906 treaty. As the United States alleged in its complaint, "[u]ncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where * * * 60,000 acre-feet per year could not be delivered to Mexico." U.S. Compl. para. 15.

---

[10] New Mexico contends (Mot. to Dismiss 51 n.6) that state law governs return flows and seepage from reclamation projects. The only authority New Mexico cites for that proposition is a Reclamation policy manual, but that manual states that "Reclamation will assert and protect its interest in return flows either under state law *or as Federal property*." Mot. to Dismiss. App. 2 (emphasis added).

The treaty is another specific directive of Congress that supersedes the application of state water law contained in Section 8 of the Reclamation Act. See *Missouri* v. *Holland*, 252 U.S. 416, 434-435 (1920) ("Valid treaties of course are * * * binding within the territorial limits of the States.") (citation and internal quotation marks omitted); *Kolovrat* v. *Oregon*, 366 U.S. 187, 198 (1961) ("After the proper [federal] governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon of course cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities.").

New Mexico has not asserted that state regulation of the Project's water right could be applied in a manner that would deprive Mexico of 60,000 acre feet of water per year. There is no logical basis for distinguishing between the State's obligation to administer state law in a manner that respects the treaty rights of Mexico, and its obligation to administer state law in a manner that respects the Compact's equitable apportionment of water between New Mexico and Texas.

2. Because the Project's right to water below Elephant Butte Reservoir must be administered in accordance with the Compact, Texas properly brought this original action to protect its Compact apportionment. To conclude otherwise would be to hold that Texas has no apportionment of water under the Compact that it can enforce. In any event, New Mexico's contention (Mot. to Dismiss 56-58) that Reclamation "has effective tools available under New Mexico law to protect the Project right from interference" is unpersuasive.

New Mexico suggests (Mot. to Dismiss 56-57) that the United States can protect the Project's water right by making a priority call on the river under New Mexico law. According to New Mexico, "[a] senior surface water user such as the Project can make a priority call against a junior groundwater user in the same basin if the groundwater use is interfering with the surface water right." *Id.* at 57. New Mexico further states that the New Mexico State Engineer has the authority to administer water rights where, as here, "a final adjudication of the rights in a given basin has not been completed." *Ibid.* Those state-law mechanisms are inadequate to protect Texas's Compact apportionment for several reasons.

First, "[a] State cannot be its own ultimate judge in a controversy with a sister State." *West Virginia* v. *Sims*, 341 U.S. 22, 28 (1951). Without this Court's protection of Texas's equitable apportionment under the Compact, New Mexico would not be constrained by anything other than its own interpretation of state law from allowing Texas's allocation of Project water from Elephant Butte Reservoir to be diminished based on an asserted state-law right of New Mexico water users to pump hydrologically connected groundwater. There is no justifiable reason why Texas's Compact apportionment must be defined by the New Mexico State Engineer, and in a suit brought by someone other than Texas. And it defies common sense to suggest that Texas agreed to have its equitable apportionment under an interstate compact—an Act of Congress prescribing a rule of *federal* law—to be defined by the *state* law of an upstream State.

Second, the Project right that New Mexico contends the United States can enforce through state

proceedings does *not* include a right to deliver water to Texas under the Compact. The United States requested that the New Mexico court recognize that the Project is entitled to up to 376,000 acre feet of water per year for delivery to Texas, in recognition of a decree from a Texas water adjudication defining the Project's water right in Texas. See p. 16, *supra*. The New Mexico court concluded, however, that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside of the scope of the elements that can properly be determined in this proceeding." 2/17/14 Order 4. But once this Court defines Texas's equitable apportionment under the Compact—and in the process defines the protection from interference the Compact affords more generally to all of the water delivered to and released from the Project—the New Mexico court can determine water rights in the New Mexico portion of the Rio Grande Basin with proper regard for the Compact and Texas's share of the water apportioned by the Compact.

Third, the process that New Mexico describes would be futile as a means to protect Texas's Compact apportionment. As described above, pp. 14-15, *supra*, the New Mexico court has concluded in the water adjudication that the Project's water right is a surface right that does not include "groundwater." According to the state court, when surface water "reaches an underground reservoir and thereby loses its identity as surface water," "through percolation, seepage[,] or otherwise," it becomes public water that is subject to appropriation as "groundwater" under New Mexico law. 8/16/12 Order 7 (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)).

The state-law doctrine that New Mexico invoked in the state adjudication to strip the Project of essential protection for seepage and return flows is based on New Mexico's interpretation of *Kelley*. In *Kelley*, the New Mexico Supreme Court held that, when surface water has "been lost to the underground reservoir," a person having a surface water right "can neither transfer his surface right nor change his point of diversion to the underground reservoir." *Id.* at 853. The United States strongly disputes the proposition that Project water that has seeped into the ground and become susceptible to pumping in New Mexico has "lost its identity" as Project return flows. Indeed, for decades before *Kelley* was decided the Project was using return flows that are hydrologically connected to such groundwater. And, as discussed above, New Mexico's interpretation of state law cannot override federal reclamation law or New Mexico's agreement in the Compact to relinquish to the Project control over the water the State delivers at Elephant Butte Reservoir, which the Project then delivers downstream for irrigation purposes and to Mexico.

Moreover, the New Mexico State Engineer has offered two major groundwater pumpers downstream of Elephant Butte Reservoir priority dates that are senior to the priority date offered to the United States.[11] To the extent that those groundwater pumpers are permitted under New Mexico state law to pump water that comes from or supports Project deliveries, New Mexico's assurance that the United States may use state

---

[11] For most of its groundwater right, New Mexico State University has been offered a priority date of 1890, and the City of Las Cruces has been offered a priority date of 1905. See Docket entry (Mar. 9, 2007); Docket entry (Aug. 31, 2005).

proceedings to prevent "*junior* appropriators in New Mexico [from] interfering with Project water rights" (Mot. to Dismiss 62 (emphasis added)) is not sufficient to protect the Project and Texas's Compact apportionment.

3. Finally, New Mexico contends (Mot. to Dismiss 39 (citation omitted)) that Article XI of the Compact "defines and limits the scope of Texas' recourse against New Mexico" and provides that Texas has recourse under the Compact only to remedy "a failure [by New Mexico] to perform 'at the point of delivery,'" *i.e.*, at Elephant Butte Reservoir. That is incorrect.

Article XI provides that "New Mexico and Texas agree that upon the effective date of th[e] Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled." 53 Stat. 790-791. It further provides that "nothing [in the Compact] shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another." 53 Stat. 791.

Article XI does not limit the scope of the parties' remedies for violations of the Compact to complaints that one State has changed the "character or quality of the water[] at the point of delivery." That language clarifies one type of claim that the parties specifically agreed could be brought under the Compact, which might not otherwise have been clear from the Compact's terms. But it does not eliminate claims based on other violations of the Compact. The most obvious potential violations of the Compact—a failure by Colorado to deliver the required *amount* of water to the

New Mexico state line, or a failure by New Mexico to deliver the required *amount* of water to Elephant Butte Reservoir—would not be remediable under New Mexico's view of Article XI because those breaches of the Compact would not be changes to the "character or quality of the water" at the point of delivery.

Furthermore, even if Article XI limited each State's remedies under the Compact to complaints that another State had changed the character or quality of water at the point of delivery, the Compact does not define "character," and the disjunctive "or" in the phrase "character or quality" of water suggests that "character" refers to something other than water quality. The term could refer, for example, to the possessory status of the water, and New Mexico could be said to have changed the character of the water at the point of delivery by preventing the Project from exercising full control over the water after New Mexico makes that delivery.

II. EVEN IF THE COURT CONCLUDES THAT TEXAS HAS NOT STATED A CLAIM UNDER THE COMPACT, THE COURT SHOULD NOT DISMISS THE UNITED STATES' COMPLAINT

Even if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the Project, the United States' complaint in intervention should nevertheless go forward. Although the United States' complaint against New Mexico does not fall within the Court's *exclusive* original jurisdiction, the Court nevertheless has original jurisdiction over controversies between the United States and a State. See U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. 1251(b)(2).

Exercise of that jurisdiction in this case would be appropriate.

The United States has a claim under the Compact because the Compact incorporates the Project and designates the "[u]sable water" in project storage as water that is "available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786. The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and the United States has a right protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands.

The Compact also protects the United States' ability to deliver water to Mexico pursuant to the 1906 treaty. The treaty specifically describes that water will be delivered to Mexico from the Project, see Art. I, 34 Stat. 2953-2954, and the Compact specifically protects the Project's right to deliver water from the Project to Mexico. Art. I(*l*), 53 Stat. 786.

Because the Project's rights under the Compact include allocating water between two States and delivering water to a foreign country, the United States' claims do not involve "competing claims to water within a single State," over which the Court has previously declined to exercise its original jurisdiction. See Mot. to Dismiss 64 (citing *United States* v. *Nevada & California*, 412 U.S. 534, 538 (1973)). New Mexico's view (*ibid.*) that this case is appropriately resolved "in a New Mexico court" should be rejected. The importance of this case to each of the sovereigns involved is such that the Court should exercise its original jurisdiction over the United States' complaint,

even if it concludes that Texas does not have an enforceable right to water deliveries under the Compact.

CONCLUSION

New Mexico's motion to dismiss Texas's complaint and the United States' complaint in intervention should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
SAM HIRSCH
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL
Assistant to the Solicitor General
KEITH E. SAXE
R. LEE LEININGER
JAMES J. DUBOIS
STEPHEN M. MACFARLANE
Attorneys

JUNE 2014

COPY 2-16-38

CONTRACT

This contract made and entered into by and between the Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas, pursuant to resolutions of the Board of Directors of the respective Districts, authorizing the same, WITNESSETH THAT:

WHEREAS, it is expedient that the acreage within each irrigation District which is to be irrigated should be cushioned by allowing the distribution of water to a small excess of acreage over and above that allotted to the two Districts under the Rio Grande New Mexico-Texas Reclamation Project, to the end that annual variations, within narrow limits, shall be permitted, and so that, each year, there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres upon which construction and operation and maintenance charges may be levied;

THEREFORE, it is mutually agreed that either District may increase the acreage to be irrigated and to be subject to construction charges, not to exceed three (3%) per cent of the present authorized acreage in each District, that is to say, Elephant Butte Irrigation District, having authorized acreage of 88,000 acres, may increase such acreage to the extent of three (3%) per cent thereof, amounting to not to exceed 2,640 acres; that El Paso County Water Improvement District No. 1, having a present authorized acreage of 67,000

acres, may increase such acreage to three (3%) per cent thereof, that is, not to exceed 2,010 acres, said additional lands, in any case, to be within the limits of the present irrigation Districts or any future extensions thereof.

It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

It is further agreed and understood that the operation and maintenance costs of the project works (exclusive of the storage and power development) for the calendar year of 1938 and thereafter shall be distributed between the two Districts in the same manner as similar costs were distributed for the calendar year 1937, and that the same ratios for the two Districts, respectively, that were applied to said costs for that year common to both Districts shall be used in 1938 and subsequent years.

This contract to be effective only during the period when the proposed contracts under Public No. 249, Seventy-fifth Congress, 1st Session, between, (1) the United States and Elephant Butte Irrigation District and (2) the United States and El Paso County Water Improvement District No. 1 are in force, and if either or both of said contracts should terminate after both have becom effective, this contract is also to terminate.

IN TESTIMONY WHEREOF, the parties hereunto have caused the same to be signed by the Presidents of their respective Boards of Directors, and attested by the Secretary with the seal of said corporation, this 16th day of February A.D. 1938.

THE ELEPHANT BUTTE IRRIGATION DISTRICT OF NEW MEXICO.

By (Signed) Arthur Starr
President

(SEAL)

ATTEST: (Signed) Jose R. Lucero
Secretary, Elephant Butte
Irrigation District.

EL PASO COUNTRY WATER IMPROVEMENT DISTRICT DISTRICT NO. 1 OF TEXAS

By (Signed) T.D. Porcher
President

(SEAL)

ATTEST: (Signed) Idus T. Gillett
Secretary, El Paso County Water
Improvement District No. 1.

APPROVED THIS 11TH DAY OF APR., A.D. 1938

(Signed) Oscar L. Chapman
ASSISTANT SECRETARY
OF THE INTERIOR